No. 77-490

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM G. BARTER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-490

WILLIAM G. BARTER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners challenge the constitutionality of the income tax rates imposed upon married individuals on the ground that the taxes that they paid as married persons filing joint returns exceeded the taxes that would have been due if they had been unmarried and filed a return reporting their separate income. In this refund suit petitioners brought in the United States District Court for the Northern District of Indiana, the district court upheld the constitutionality of the difference in tax rates (Pet. App. 29-60). The court of appeals affirmed *per curiam* (Pet. App. 61-63).

1. The income tax is progressive and taxes married couples with equal income equally. Given these two objectives, the disparities between the relative tax burdens of married persons and single persons are inevitable and a

"marriage-neutral" income tax is impossible. In some cases, the tax will appear to penalize single persons; in other cases the tax will appear to penalize married persons. The best that can be attained is a reasonable compromise. See Hearings on Tax Treatment of Single Persons and Married Persons Where Both Spouses Are Working before the House Committee on Ways and Means, 92d Cong., 2d Sess. 78-79 (1972); Bittker, *Federal Income Taxation and the Family*, 27 Stan. L. Rev. 1389, 1395-1396 (1975).

The tax rates in Section 1 of the Internal Revenue Code of 1954, as amended (26 U.S.C.) are substantially the result of two major reforms that sought such a compromise. Prior to 1948, only married couples in community property states were entitled to divide their incomes for tax purposes and thereby reduce their total tax liabilities. Compare *Poe* v. *Seaborn*, 282 U.S. 101, with *Lucas* v. *Earl*, 281 U.S. 111. In order to correct the disparity of tax treatment between married couples in community property states and those in common law states, Congress in 1948 permitted income-splitting by means of the joint return. See H.R. Rep. No. 1274, 80th Cong., 2d Sess. 21-24 (1948) S. Rep. No. 1013, 80th Cong., 2d Sess. 22-25 (1948). Cf. *Fernandez* v. *Wiener*, 326 U.S. 340.

While the 1948 introduction of income-splitting benefited married persons, it was not accompanied by a reduction in the tax rates of single persons. As a result, the income tax on a single person could thereafter range as much as 40.9 percent higher than the tax on a married couple with the same income. See S. Rep. No. 91-552, 91st Cong., 1st Sess. 260 (1969). Although single persons asserted that the higher rates denied them due process and equal protection of the law, the courts upheld the constitutionality of the statute on the ground that the

objective of providing equal treatment for all married couples was a reasonable legislative purpose. *Faraco* v. *Commissioner*, 261 F. 2d 387 (C.A. 4), certiorari denied, 359 U.S. 925; *Kellems* v. *Commissioner*, 58 T.C. 556, affirmed *per curiam*, 474 F. 2d 1399 (C.A. 2), certiorari denied, 414 U.S. 831.

In 1969, Congress sought to reduce the substantially higher tax burden on single persons. It therefore amended Section 1 of the Code so that a single person will never be required to pay a tax that would exceed by more than 20 percent the tax that a married couple would pay on the same income. See S. Rep. No. 91-552, *supra*, at 260-262; Tax Reform Act of 1969, Section 803, 83 Stat. 678. These new rates ameliorate the disproportionate tax burden on the unmarried. Moreover, under the new rates, the tax on a married couple will exceed the tax on a single person with the same income only when the husband and wife each has a substantial income, a situation affecting only about 20 percent of married couples. House Hearings, *supra*, at 75, 79. In general, therefore, the tax rates still favor married taxpayers.

To be sure, the present tax system still contains some disparities. But given the inherent complexity of the problem, the taxing scheme Congress adopted in 1948 and refined in 1969, while not perfect, nevertheless satisfies the requirements of due process and equal protection. While petitioners object to the fact that, relative to single persons, married persons do not always fare as well, married persons do not have a constitutional right to most favored tax treatment.

2. Contrary to petitioners' argument (Pet. 13), the decision below does not conflict with *Hoeper* v. *Tax Commission*, 284 U.S. 206. In *Hoeper*, the Court held unconstitutional a Wisconsin law requiring a husband to

report as his own the income of his wife over which he had no title or control. Here, however, the Section 1 tax rates that petitioners challenge do not require the attribution of income from one spouse to the other. The joint return for married persons is elective, not required (see Section 6013), and married persons are free to file separately.

While married persons filing separate returns will pay more tax, in the aggregate, than if they filed jointly (see and compare Section 1(a) and (d) of the Code), each spouse still would be paying tax only on his or her separate income. Furthermore, if married persons filing separately could use the tax rates for single persons, or under any conceivable schedule pay less tax than if they filed jointly, then the tax liability of married couples would once again depend, as it did before 1948, on the amount of income attributable to each spouse. In that event, the 1948 principle of imposing the same tax on all equal-income married couples would be abandoned.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

NOVEMBER 1977.

DOJ-1977-11